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No.

In the Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL O. LEAVITT, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONERS

v.

TENNESSEE VALLEY AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the Clean Air Act's sanctions for non-compliance with an EPA order violate TVA's rights under the Due Process Clause and Article III of the Constitution, thereby rendering the order issued by EPA to TVA in this case without legal effect—and therefore non-final and not subject to judicial review.

2. Whether a dispute between TVA and EPA, two executive-branch agencies whose leaders serve at the pleasure of the President, presents a justiciable case or controversy.

3. Whether, if there is a justiciable case or controversy, TVA has independent litigating authority to bring this case over the objection of the Attorney General.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the Alabama Power Company; the Duke Energy Corporation; the Tennessee Valley Public Power Association; the Memphis Light, Gas & Water Division; the Electric Power Board of Chattanooga; the Middle Tennessee Electric Membership Corporation; the North Georgia Electric Membership Corporation; and the Volunteer Electric Cooperative were petitioners in the court of appeals and are respondents here.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Environmental Protection Agency and Michael O. Leavitt, Administrator, United States Environmental Protection Agency, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals dismissing the petitions for review (Pet. App. 1a-50a) is reported at 336 F.3d 1236. The opinion of the court of appeals addressing other threshold issues (Pet. App. 51a-99a) is reported at 278 F.3d 1184. The court of appeals' order denying rehearing (Pet. App. 328a-329a) is not reported. The decision of the Envi-

ronmental Protection Agency's Environmental Appeals Board (Pet. App. 100a-327a) is reported at 9 E.A.D. 357.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 2003. A petition for rehearing was denied on September 16, 2003. On December 5, 2003, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including January 14, 2004, and on January 5, 2004, Justice Kennedy further extended the time for filing a petition for a writ of certiorari to and including February 13, 2004. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Clean Air Act, 42 U.S.C. 7401, *et seq.*, are reprinted in an appendix to this petition.

STATEMENT

This case concerns, *inter alia*, the constitutionality of the Clean Air Act's provisions authorizing the imposition of sanctions on persons who fail to comply with EPA orders. The court of appeals invalidated those provisions under the Due Process Clause and Article III of the Constitution. That decision strikes at the heart of EPA's enforcement authority under the Clean Air Act and merits this Court's review.

1. Under the Clean Air Act, 42 U.S.C. 7401 *et seq.*, each State must establish as part of its state implementation plan (SIP) a system of pre-construction permitting requirements for new and modified stationary sources of pollutants. 42 U.S.C. 7410(a)(2)(C). The Act defines a "modification" as

> any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

42 U.S.C. 7411(a)(4); see 42 U.S.C. 7479(2)(C), 7501(4). EPA regulations contain an exception to that definition, providing that "[a] physical change or change in the method of operation shall not include * * * [r]outine maintenance, repair, and replacement." 40 C.F.R. 52.21(b)(2)(iii)(*a*).[1]

Under the Act, EPA has authority to issue enforcement orders in a variety of circumstances. Of relevance here, "whenever, on the basis of any information available to the Administrator," he "finds that any person has violated or is in violation of any requirement or prohibition of an applicable [state] implementation plan or permit," the Administrator may, after notice and a 30-day waiting period, "issue an order requiring such person to comply with the requirements or prohibitions of such plan or permit." 42 U.S.C. 7413(a)(1). The Administrator may issue similar orders upon a finding of a violation of certain sections of the Act as well. 42 U.S.C. 7413(a)(3). An administrative compliance order (ACO) "shall state with reasonable specificity the nature of the violation and specify a time for compliance which the Administrator determines is reasonable." 42 U.S.C. 7413(a)(4). Other provisions of the Act also authorize the Administrator to issue orders. See, *e.g.*, 42 U.S.C. 7413(a)(2) and (a)(5), 7477, 7603.

2. The Tennessee Valley Authority (TVA) is a federal agency with responsibility, *inter alia*, for providing electric power within an area in the southeastern United States. 16 U.S.C. 831n-4(h). To accomplish that end, TVA owns and operates 11 coal-fired electric power plants. Pet. App. 56a.

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[1] EPA recently promulgated new regulations regarding the scope of the exclusion for "routine maintenance, repair and replacement." 68 Fed. Reg. 61,248 (Oct. 27, 2003). The new regulations have prospective application only, and thus have no application to the merits of this case. See *id.* at 61,273. The D.C. Circuit has stayed the new regulations pending resolution of a petition for review challenging them. *New York* v. *EPA*, No. 03-1380 (D.C. Cir. Dec. 24, 2003).

Between 1982 and 1996, TVA made a number of changes to its generating units. *Id.* at 12a.

EPA determined that those changes constituted "construction" for purposes of the pre-construction permitting requirement under 42 U.S.C. 7475(a) and violated state plans that require permits for construction of "modified" sources under 42 U.S.C. 7502(c)(5). See 42 U.S.C. 7479(2)(C) (defining "construction" to include "modification" as defined in Section 7411(a)(4)), 7501(4) (adopting definition in 7511(a)(4) for "modified"). EPA also concluded that the changes did not fit within the regulatory exemption for "[r]outine maintenance, repair, and replacement" under 40 C.F.R. 52.21(b)(2)(iii)(*a*). On November 3, 1999, EPA therefore issued an administrative compliance order to TVA, pursuant to Sections 113 and 167 of the Act, 42 U.S.C. 7413, 7477. The order required TVA to comply with the Act by seeking permits that would set emission limits reflecting the required level of pollution control with respect to modifications that had been made at nine facilities. The order also required TVA to provide information to EPA identifying any other construction activities that constitute unpermitted major modifications. Pet. App. 13a, 54a. EPA and TVA negotiated several amendments to the order, but TVA continued to dispute the findings of non-compliance. *Id.* at 13a-14a, 54a-55a.

On May 4, 2000, EPA informed TVA that it would "reconsider" its order but expected compliance by TVA in the meantime. Pet. App. 57a-58a. Ordinarily, EPA may choose to bring an administrative penalty action or a judicial enforcement action if the recipient of an order refuses to comply with it. See 42 U.S.C. 7413(d), 7413(b). Because the government views inter-agency litigation as non-justiciable, however, no judicial enforcement action could be brought by EPA. Neither the Act nor EPA's regulations set forth a particular procedure for a "reconsideration" of the adminis-

trative compliance order issued to TVA. The EPA Administrator referred the matter to the agency's Environmental Appeals Board (EAB) to handle the reconsideration. Pet. App. 14a-16a, 57a-58a. The Board asked an administrative law judge to supervise discovery and hold an evidentiary hearing. *I d.* at 16a-18a, 58a, 115a. After a period of "voluntary, cooperative" discovery, a six-day hearing that included presentation and cross-examination of multiple witnesses by both sides was held, beginning on July 11, 2000. *Id.* at 115a, 117a-118a.

The results of the hearing were sent to the Board. The Board rejected two motions by TVA to compel further discovery, because the Board did "not see the additional discovery * * * as ultimately leading to the addition of evidence adding significant probative value to the substantial information already in the record." Pet. App. 123a-124a. The Board received numerous post-hearing briefs regarding the various issues in the case. On September 15, 2000, the Board issued a 188-page "Final Order on Reconsideration," which partially upheld and partially rejected the administrative compliance order. *Id.* at 100a-327a.

3. Meanwhile, the Associate Attorney General, acting on behalf of the Attorney General, had sent a letter to TVA on May 4, 2000, referring to the EPA order and stating:

> to the extent that TVA may have been planning litigation against EPA based on a mistaken assumption that the Attorney General has tacitly authorized TVA to pursue such litigation, this letter will serve to clarify that there has been no such authorization and that TVA should not bring this lawsuit. The Department of Justice is prepared, in the event that TVA seeks judicial review of EPA's compliance order, to seek dismissal on the

> ground that TVA lacks authority to prosecute such an action, as well as on other appropriate grounds.

Pet. App. 331a.

4. Notwithstanding that letter, TVA filed petitions for review in the court of appeals in May 2000, seeking review of both the EPA order and EPA's letter requiring compliance during reconsideration. Pet. App. 14a. Several other entities who were not the subject of the order also filed petitions for review of the order; they included respondents Alabama Power Company, Duke Energy Corporation, and the Tennessee Valley Public Power Association. *Id.* at 53a-54a n.1. In November 2000, after the final order of the Environmental Appeals Board was issued, TVA and several other entities filed additional petitions for review of the final order. *Id.* at 19a, 59a n.4.

5. The court of appeals consolidated all of the petitions for review and issued an opinion addressing a series of threshold issues on January 8, 2002. Pet. App. 51a-99a. The court initially held that the challenges by TVA and the other respondents to the original EPA order and the May 4 decision to reconsider that order were moot, as a result of the Environmental Appeals Board's issuance of its Final Order on Reconsideration. *Id.* at 60a-61a. The court went on to hold, *inter alia*, that challenges to the EAB's final decision were justiciable. *Id.* at 64a-89a.

The government had moved to dismiss TVA's petition for review, on the ground that the dispute between TVA and EPA—two Executive Branch agencies whose leaders serve at the President's pleasure—did not present an Article III case or controversy. The court recognized the "general principle that no person may sue himself." Pet. App. 65a (quoting *United States* v. *ICC*, 337 U.S. 426, 430 (1949)). But the court held that *United States* v. *Nixon*, 418 U.S. 683 (1974), "appears to articulate a general analytical framework, di-

recting courts to inquire whether the controversy is one that is typically justiciable, and whether the setting of the case is one that demonstrates concrete adversity between the parties." Pet. App. 70a. Applying that analysis, the court concluded that the case "is traditionally justiciable" because, under the Clean Air Act, "[a] privately-owned power generating facility would * * * indisputably be entitled to petition for appellate review of a final order." *Id.* at 73a. The court also concluded that "the setting of this dispute presents concrete adversity," because "TVA possesses unique independence as a federal agency" and "EPA and TVA advocate genuinely conflicting views." *Id.* at 73a, 74a. The court concluded that "this particular controversy between these executive branch agencies is justiciable" and that Executive Order Nos. 12,146 and 12,088, which govern interagency dispute resolution, "provide * * * no compelling reason to decline to exercise our jurisdiction." *Id.* at 74a, 89a.

The court also rejected the government's argument "that TVA lacks independent litigating authority to bring this action over the opposition of the Attorney General." Pet. App. 61a; see 28 U.S.C. 516, 519. The court noted that TVA had repeatedly represented itself in court since its founding in 1933, and that two district courts and the Federal Circuit had rejected previous claims by the government that TVA lacked such authority. Pet. App. 61a-64a. The court held that "the unique history of the TVA and its intended independence compel the results reached in these cases." *Id.* at 63a (footnote omitted).

Finally, the government had challenged the standing of the non-TVA petitioners to challenge the order, which had been issued only to TVA. The court held that the non-TVA petitioners had standing to challenge the order issued to TVA. Pet. App. 89a-98a.

6. After hearing oral argument on the merits, the court issued an opinion sua sponte dismissing the petitions for review, holding that EPA compliance orders under the Clean Air Act are not final and therefore not subject to judicial review. Pet. App. 1a- 50a. The court based that holding on its conclusion that the statutory scheme under which the recipient's non-compliance with such orders is subject to civil and criminal sanctions is unconstitutional. In the court's view, that conclusion deprives the orders of their finality, because it eliminates their status as actions "in which 'rights or obligations have been determined' or from which 'legal consequences will flow.'" *Id.* at 22a (quoting *Bennett* v. *Spear*, 520 U.S. 154, 178 (1997)).

The court began its analysis by considering the Clean Air Act's scheme for issuance and enforcement of EPA orders. The court noted that the Act provides that the Administrator may "find" a violation of the Act and issue an order "on the basis of any information available to the Administrator." 42 U.S.C. 7413(a)(1). In the court's view, that means that the "Administrator need only have a staff report, newspaper clipping, anonymous phone tip, or anything else that would constitute 'any information.'" Pet. App. 7a. Once having been issued, EPA orders "have the status of law," because "a violation of an [order] can itself serve as the basis for the imposition of extensive civil fines or imprisonment." *Id.* at 3a, 8a; see *id.* at 37a.

The court held that the statutory scheme, as understood above, "is repugnant to the Due Process Clause of the Fifth Amendment." Pet. App. 43a. In the court's view, the "scheme enacted by Congress deprives the regulated party of a 'reasonable opportunity to be heard and present evidence' on the two most crucial issues: (a) whether the conduct underlying the issuance of the [order] actually took place and (b) whether the alleged conduct amounts to a [Clean Air Act] violation." *Id.* at 43a-44a (footnote omitted);

see *id.* at 11a ("The EPA is the ultimate arbiter of guilt or innocence.").

The court rejected the proposition that the constitutional problem could be cured if EPA "voluntarily undert[ook] an adjudication prior to the issuance of an [order]," as it had done in this case in the proceeding before the Environmental Appeals Board. Pet. App. 44a. In the court's view, because the Act plainly provides that EPA may issue an order on the "basis of any information available to the Administrator," "[t]his is not an area in which the organic statute has set a vague standard, and there is simply no room for administrative discretion on this point." *Ibid.* Moreover, the court held, "a pre-ACO adjudication would only highlight another constitutional problem with the [Clean Air Act]: the statutory scheme unconstitutionally delegates judicial power to a non-Article III tribunal." *Ibid.* That is because, in the court's view, district courts in an EPA action enforcing a Clean Air Act order are merely "forums for the EPA to conduct show-cause hearings" and courts of appeals in pre-enforcement review proceedings "review[] only whether the ACO has been validly issued—*i.e.*, whether the Administrator based her decision to issue the ACO based upon 'any information' as opposed to no information at all." *Id.* at 44a, 45a. The court concluded that, "[w]ithout meaningful judicial review, the scheme works an unconstitutional delegation of judicial power." *Id.* at 45a.

Having determined that EPA orders have no legal consequence, the court held that "ACOs lack finality because they do not meet prong two of the *Bennett* test." Pet. App. 45a. For that reason, the court concluded, "courts of appeals lack jurisdiction to review the validity of ACOs," and it ordered the petitions for review dismissed. *Ibid.*

Judge Barkett, joined by Judge Wilson, concurred specially. Although they were not critical of the Environmental Appeals Board process, see Pet. App. 48a-49a & n.1, they

concluded that, because EPA can issue an order based on "any information available" and because "penalties, either civil or criminal, can be assessed based only upon a showing that the terms of the order to comply were violated," the "scheme must be deemed violative of the due process protections of our Constitution." *Id.* at 48a. Judge Barkett also agreed with the court's opinion that EPA may not cure any due process problem by providing a voluntary hearing, as it did here. In her view, that "cannot be deemed sufficient because constitutional due process cannot be provided on an ad hoc basis under the direction and control of the entity whose decision is being challenged." *Id.* at 49a.

7. The government filed a petition for rehearing and rehearing en banc. The petition noted that no party in the case had argued that the Clean Air Act scheme under which EPA issues orders violates the Due Process Clause, and that due process concerns are in any event misplaced in a proceeding involving a federal agency, which is not a "person" for purposes of the Due Process Clause. Pet. for Reh'g 11, 12. The petition also argued that the court had erred in construing the statutory scheme to bar courts from conducting a meaningful review of EPA orders, especially in light of the settled principle that statutes should be construed, if at all possible, to avoid serious constitutional problems. *Id.* at 12-13. The court denied the petition. Pet. App. 328a-329a.

REASONS FOR GRANTING THE PETITION

The court of appeals rested its constitutional holding on the erroneous premise that the Clean Air Act provides EPA with virtually unreviewable authority to order regulated parties to take action and to subject them to severe civil and criminal penalties if they do not comply. That construction of the Act, which does not accord with EPA's own understanding and practice under the statutory scheme, which no party in this case advanced, and which has never been

accepted by any other court, is mistaken on its own terms. It also contravenes the cardinal principle that statutes should be construed to avoid—not invite—constitutional problems. The court of appeals' statutory holding that courts are precluded under the Act from genuine substantive review of EPA orders conflicts with this Court's recent decision in *Alaska Department of Environmental Conservation* v. *EPA* (*Alaska DEC*), No. 02-658 (Jan. 21, 2004), which in fact conducted a careful review of the merits of an EPA order. The court's conclusion that all EPA orders under the Clean Air Act lack finality conflicts with decisions of at least two other courts of appeals, which have held that some orders under the Act are final and subject to judicial review. The court's decision threatens EPA's Clean Air Act enforcement program in the States of the Eleventh Circuit. Further review is warranted.

The court of appeals reached its constitutional holding only after mistakenly resolving two threshold issues. First, the court mistakenly resolved an important jurisdictional question, when it ruled that disputes between two Executive Branch agencies are justiciable so long as the dispute is one that could occur between a private party and a government agency and so long as the court can expect a vigorous adversary presentation. Disputes between Executive Branch agencies whose leaders serve at the President's pleasure do not present a "case or controversy" under Article III of the Constitution. Second, the court of appeals mistakenly ruled that TVA had independent litigating authority to file its petition for review over the objection of the Attorney General, notwithstanding federal statutes that entrust the authority to conduct government litigation to the Attorney General or his delegates. The important purpose of that statutory delegation of authority—to enable the United States to speak with one voice in the courts—is defeated by

the court of appeals' holding. Further review of these threshold issues is warranted.

A. Constitutionality Of The Clean Air Act Enforcement Scheme

The court of appeals' judgment of dismissal was based entirely on its conclusion that EPA orders under the Clean Air Act "are legally inconsequential and do not constitute final agency action." Pet. App. 3a. The court accepted that the text of the Act itself provides EPA orders with real and important legal consequences. See, *e.g.*, *ibid.* ("[T]he [Clean Air Act] empowers the EPA Administrator to issue ACOs that have the status of law."), 37a ("[S]everal provisions of the [Clean Air Act] undeniably authorize the imposition of severe civil and criminal penalties based solely upon noncompliance with an ACO."). But the court held that "[t]he Clean Air Act is unconstitutional to the extent that mere noncompliance with the terms of an ACO can be the sole basis for the imposition of severe civil and criminal penalties." *Id.* at 46a. Having held unconstitutional the provisions of the Act that provide for sanctions for noncompliance, the court concluded that EPA orders under the Act do not satisfy the test for finality in *Bennett* v. *Spear*. See 520 U.S. at 178 (final action "must be one by which rights or obligations have been determined, or from which legal consequences will flow") (internal quotation marks omitted).

1. *The court of appeals' decision is based on a mistaken construction of the Act.* The court's constitutional holding is based on a mistaken construction of the Clean Air Act's provisions for issuance and review of EPA orders. The crucial error was the court's holding that EPA orders under the Act are not subject to meaningful judicial review. In the court's view, because EPA may issue an order "on the basis of any information available to the Administrator," 42 U.S.C. 7413, "[t]he only real inquiry" in a subsequent judicial proceeding

to enforce the order or to obtain pre-enforcement review (as here) "is whether the Administrator possessed 'any information'—a standard that is less rigorous than the 'probable cause' standard found in the criminal law setting." Pet. App. 30a. In the judicial proceeding, "[w]hether the Administrator's facts are too thin to warrant an adjudicated finding that [the Clean Air Act] has, in fact, been violated is irrelevant as far as ACOs are concerned." *Ibid.* In short, the court concluded that "Congress established a scheme in which noncompliance with an ACO * * * can lead to the imposition of severe civil penalties and imprisonment—even if the EPA is incapable of proving an act of illegal pollution in court." *Id.* at 39a.

There is no provision of the Clean Air Act that precludes effective judicial review of EPA orders. The court of appeals relied primarily on provisions stating that an order may issue "[w]henever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated or is in violation of" a state implementation plan or certain Clean Air Act provisions. 42 U.S.C. 7413(a)(1) and (3). Those provisions require the Administrator to make a "find[ing]," which is naturally read to require a determination that there has actually been a violation of the specified provisions—not merely that the Administrator has a hunch or suspicion that such a violation exists. The "any information available" standard does not weaken that requirement. Instead, it simply means that the Administrator need not apply judicial rules of evidence or follow formal hearing procedures in determining whether there has been a violation of the Act that warrants issuance of an order.[2]

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[2] Cf. 18 U.S.C. 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider

There is no reason to read that provision, as the court of appeals did, to require a court to "stop its analysis after finding that the 'any information' standard has been met." Pet. App. 45a n.41.

Nor does anything in the Clean Air Act's penalty provisions suggest that violation of an invalid order would be sufficient to support civil penalties. The Act provides that EPA may "commence a civil action * * * to assess and recover a civil penalty * * * [w]henever [a] person has violated, or is in violation of, [a] requirement or prohibition" of various Clean Air Act provisions, "including * * * a requirement or prohibition of any * * * order * * * issued, or approved under this chapter." 42 U.S.C. 7413(b)(2). That authorization of penalties for violation of an EPA "order" is most reasonably read to refer only to violation of a *valid* order. See *Alaska DEC*, slip op. 16 ("EPA's orders effectively halted construction of the MG-17 generator, for Cominco would risk civil and criminal penalties if it defied a *valid* EPA directive.") (emphasis added). Thus, in an action for civil penalties for violation of an order, if the court determines that the order is invalid because it is not the case that the subject of the order "has violated, or is in violation of" designated provisions of the Act, 42 U.S.C. 7413(a)(5), then no civil penalties could be imposed.[3] The same is true of criminal penalties. See 42 U.S.C. 7413(c).

In short, contrary to the court of appeals' holding, the underlying merits of an EPA order issued under the Clean Air

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for the purpose of imposing an appropriate sentence."); Sentencing Guidelines § 1B1.4 (similar).

[3] Another provision of the Act supports that conclusion by requiring that, before assessing a civil penalty, a court must "take into consideration * * * such * * * factors as justice may require." 42 U.S.C. 7413(e)(1). The invalidity of the underlying order would be a "factor" that "justice * * * require[s]" a court to "take into consideration," and it would preclude imposing civil penalties.

Act are always subject to judicial review—either on petition for review or in a subsequent enforcement action—before court-ordered sanctions may be imposed.[4] That entirely eliminates the constitutional problem that the court of appeals perceived as a "patent violation of the Due Process Clause." Pet. App. 44a.[5]

That understanding of the statute also eliminates the court of appeals' concern that "the statutory scheme unconstitutionally delegates judicial power to a non-Article III tribunal" and "relegates Article III courts to insignificant tribunals." Pet. App. 44a. No person is subject to any civil penalties without having had the opportunity to demonstrate to a court that the order on which the penalties are based is invalid or that he has not in fact violated the order.

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[4] Cf. 42 U.S.C. 7607(b)(2) ("Action of the Administrator with respect to which review could have been obtained under [42 U.S.C. 7607(b)(1), prior to enforcement] shall not be subject to judicial review in civil or criminal proceedings for enforcement.").

[5] The court of appeals' due process holding is also wrong on two additional grounds. First, the United States, as sovereign, is not a "person" within the meaning of the Due Process Clause. *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989) ("[I]n common usage, the term 'person' does not include the sovereign, and statutes employing the word are ordinarily construed to exclude it.") (citations and brackets omitted); see also *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-24 (1966) ("person" does not include a State). The statutory scheme as applied to the TVA, a federal agency, therefore could not have violated that Clause. Second, because TVA received very extensive procedures and discovery both before an administrative law judge and before the Environmental Appeals Board, there would in any event have been no violation of the Due Process Clause on the facts of this case. The court's holding that the EPA cannot "'save' the statute by voluntarily undertaking an adjudication prior to the issuance of an ACO," Pet. App. 44a, is mistaken. See, *e.g.*, *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978) (noting that agencies may "fashion their own rules of procedure," even when a statute does not specify what process to use); see also *Alaska DEC*, slip op. 17.

That is sufficient to satisfy Article III. *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 853 (1986); *Crowell* v. *Benson*, 285 U.S. 22, 55-60 (1932).

The court of appeals' mistaken construction of the Clean Air Act's provisions for EPA orders was not briefed by the parties or urged by any party to this case, and it contravenes EPA's own understanding of the Act. The court of appeals should have proceeded more cautiously before proclaiming portions of an Act of Congress unconstitutional. Indeed, even if the court of appeals' understanding of the Clean Air Act were otherwise a reasonable one, the bedrock principle that statutes should be construed to avoid substantial constitutional problems would be sufficient to refute it. *INS* v. *St. Cyr*, 533 U.S. 289, 299-300 (2001) ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems.") (citation omitted). The court of appeals erred in disregarding that principle.

2. *The court of appeals' decision conflicts with a decision of this Court and decisions of two other courts of appeals and is of substantial importance.* The court of appeals' construction of the Clean Air Act conflicts with this Court's decision in *Alaska DEC*, *supra*. The court of appeals' premise in this case was that, in an EPA judicial enforcement proceeding or a proceeding for pre-enforcement review, "[t]he only real inquiry is whether the Administrator possessed 'any information'—a standard that is less rigorous than the 'probable cause' standard found in the criminal law setting." Pet. App. 30a. In *Alaska DEC*, however, one question before this Court was whether an EPA Clean Air Act order issued under 42 U.S.C. 7413(a)(5) and 7477 was valid. Slip op. 30-36. Under the court of appeals' construction of the Clean Air Act, answering that question would have required only an inquiry into "whether the Admini-

strator possessed 'any information'" suggesting that the Act had been violated, Pet. App. 30a, and "any further inquiry * * * would be unnecessary and unauthorized," *id.* at 45a n.41. This Court, however, clearly conducted a more searching inquiry in *Alaska DEC*, "apply[ing] the familiar default standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and ask[ing] whether the Agency's action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Slip op. 31. Cf. *id.* at 28 ("[I]n either an EPA-initiated civil action or a challenge to an EPA stop-construction order filed in state or federal court, the production and persuasion burdens remain with EPA."). The court of appeals' construction of the Clean Air Act is inconsistent with this Court's decision in *Alaska DEC*.

The decision in this case also conflicts with decisions of at least two courts of appeals. The ultimate holding of the court in this case was that "courts of appeals lack jurisdiction to review the validity of ACOs." Pet. App. 46a. As the court itself recognized, *id.* at 40a, that conclusion conflicts with decisions of the Ninth Circuit in *Alaska Department of Environmental Conservation* v. *EPA*, 244 F.3d 748 (2001), aff'd, No. 02-658 (Jan. 21, 2004), and the Sixth Circuit in *Allsteel, Inc.* v. *EPA*, 25 F.3d 312, 314-315 (1994), holding that the EPA Clean Air Act orders in those cases were final and subject to review. In *Allsteel*, for example, the court concluded that the EPA order before it was final because "if the [EPA] order was valid," its "impact * * * is practical, immediate, and significant." 25 F.3d at 315. Accord, *Alaska Dep't of Envtl. Conservation*, 244 F.3d at 750 (concluding that "'legal consequences will flow,' if Cominco chooses to disregard the [EPA] Order and go forward with construction"). That conclusion is inconsistent with the court of appeals' holding

in this case that EPA orders "are legally inconsequential and do not constitute final agency action." Pet. App. 3a.[6]

The court of appeals' decision that TVA "is free to ignore the ACO" because it is "inconsequential," Pet. App. 3a, could significantly hamper EPA's enforcement program under the Clean Air Act and other statutes as well.[7] Administrative orders are a significant component of EPA's efforts to protect human health and the environment, especially where quick action is required. EPA issues more than a thousand such orders each year under the various environmental statutes. Were there no threat of any penalty for noncompliance, recipients of the orders would be free to violate them with impunity. That would be a substantial impediment to EPA's enforcement efforts. Further review of the court of appeals' constitutional holding is therefore warranted.

B. No Case Or Controversy Between TVA And EPA

As a threshold matter, the court of appeals should have held that TVA's petition for review was non-justiciable because the petition presented only a dispute between two Ex-

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[6] As the court of appeals acknowledged (Pet. App. 40a-43a), its reasoning also conflicts with the reasoning of several other decisions holding that EPA orders in certain contexts were non-final, but adopting a different construction of the Clean Air Act than that adopted by the Eleventh Circuit in this case. See *Solar Turbines, Inc.* v. *Seif*, 879 F.2d 1073 (3d Cir. 1989); *Asbestec Constr. Servs.* v. *EPA*, 849 F.2d 765 (2d Cir. 1988); *Lloyd A. Fry Roofing Co.* v. *EPA*, 554 F.2d 885, 891 (8th Cir. 1977); see also *Southern Pines Assocs.* v. *United States*, 912 F.2d 713 (4th Cir. 1990) (Clean Water Act).

[7] The court of appeals noted the similarity between the Clean Air Act enforcement scheme and aspects of the Clean Water Act scheme. See Pet. App. 37a n.32. Although the various statutory schemes differ in a variety of ways, the enforcement schemes under a number of other environmental statutes also provide for penalties for noncompliance with EPA orders. See, *e.g.*, 42 U.S.C. 300g-3(b) (Safe Drinking Water Act); 42 U.S.C. 6928 (RCRA); 42 U.S.C. 9606 (CERCLA).

ecutive Branch agencies whose heads serve at the pleasure of the President. There is a "long-recognized general principle that no person may sue himself" because courts "do not engage in the academic pastime of rendering judgments in favor of persons against themselves." *United States* v. *ICC*, 337 U.S. 426, 430 (1949). Because an Article III court cannot render advisory opinions, *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113-114 (1948), Article III courts may not adjudicate disputes arising between commonly controlled entities.

For example, in *South Spring Hill Gold Mining Co.* v. *Amador Medean Gold Mining Co.*, 145 U.S. 300 (1892), two formerly adverse parties "had come into the hands of the same persons" after the court of appeals reached its decision. *Id.* at 301. This Court declined to issue a ruling, because "the litigation ha[d] ceased to be between adverse parties, and the case therefore falls within the rule applied where the controversy is not a real one." *Ibid.* It is particularly important to "confine[] the federal courts to the role assigned them by Article III" when, as in this case, "the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government." *Flast* v. *Cohen*, 392 U.S. 83, 96 (1968).

1. *There is no case or controversy between TVA and EPA.* This case fits comfortably within the general rule that a dispute between two government agencies whose heads serve at the pleasure of the President does not result in a justiciable "case or controversy." Indeed, the court of appeals accepted that "both EPA's Administrator and TVA's board serve at the pleasure of the President." Pet. App. 85a. EPA is a government agency, whose Administrator serves an indefinite term by appointment of the President with the advice and consent of the Senate. See Reorg. Plan No. 3 of 1970, § 1(b), 5 U.S.C. App. at 184. TVA, a government corporation, is headed by a three-person board whose

members serve fixed, nine-year terms by appointment of the President with the advice and consent of the Senate. 16 U.S.C. 831a(a) and (b). As this Court has explained, "[i]n the absence of specific provision to the contrary, the power of removal from office is incident to the power of appointment." *Keim* v. *United States*, 177 U.S. 290, 293 (1900). Because there is no such "specific provision to the contrary" in TVA's charter, the members of TVA's Board accordingly may be removed by the President at will. See *Morgan* v. *TVA*, 115 F.2d 990 (6th Cir. 1940), cert. denied, 312 U.S. 701 (1941).

Regardless of how an Article III court rules in a controversy between two agencies of the Executive Branch whose heads serve at the pleasure of the President, the President could require the agency that won in court to follow the course urged by the losing agency. The possibility of such an outcome renders the court's opinion advisory. Because that possibility exists in this case, there is no case or controversy between TVA and EPA.

2. *The court of appeals' relaxed standard is not supported by this Court's cases.* The court of appeals relied primarily on *United States* v. *Nixon*, 418 U.S. 683 (1974), to adopt a far looser, two-part test for determining whether a case or controversy exists in a dispute between two Executive Branch agencies. In the court's view, such a dispute represents a justiciable case or controversy so long as the case is "traditionally justiciable," which the court construed to mean only that a similar dispute could arise when one of the parties is a private entity. See Pet. App. 73a (finding that the "traditionally justiciable" standard is satisfied here because "[a] privately-owned power generating facility would thus indisputably be entitled to petition for appellate review of a final order"). The court also held that a dispute between Executive Branch agencies requires "concrete adversity," which the court found to be satisfied because in its view "TVA possesses unique independence as a federal

agency" and "EPA and TVA advocate genuinely conflicting views." *Id.* at 73a, 74a.

The court of appeals erred in concluding that disputes between Executive Branch agencies are justiciable so long as its two, easily-satisfied conditions are met. Aside from *Nixon*, each of the cases on which the court of appeals relied involved one of two scenarios not present here.

In one class of inter-agency cases, one party to the dispute was an agency exercising quasi-legislative or quasi-judicial functions whose leaders are statutorily protected against removal by the President.[8] In those cases, the for-cause removal provisions effect a reduction in presidential control that is typically substantial and that can in some circumstances be constitutionally decisive. Cf. *Bowshar* v. *Synar*, 478 U.S. 714 (1986). Those cases do not support the court of appeals' conclusion that there is a case or controversy here, because TVA's board members *do* serve at the pleasure of the President.

In the other class of cases, one agency to the dispute is in fact aligned with a private party who is the real party in interest. In those cases, the real dispute arises between the government and the private party, as the Court explained in *United States* v. *ICC*, 337 U.S. 426 (1949).[9] The "basic question" in that case was "whether railroads have illegally exacted sums of money from the United States," *id.* at 430, and

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[8] See, *e.g.*, *NASA* v. *FLRA*, 527 U.S. 229 (1999); *Escondido Mut. Water Co.* v. *La Jolla Band of Mission Indians*, 466 U.S. 765 (1984); *Federal Maritime Bd.* v. *Isbrandtsen Co.*, 356 U.S. 481, 483 n.2 (1958); *United States* v. *ICC*, 352 U.S. 158 (1956); *Udall* v. *Federal Power Comm'n*, 387 U.S. 428 (1967). The Court did not address the case-or-controversy issue in any of those cases.

[9] See, *e.g.*, *United States* v. *Marine Bancorporation*, 418 U.S. 602, 614 (1974) (intervention of Comptroller of Currency in support of private party); *United States* v. *First City Nat'l Bank*, 386 U.S. 361, 363 (1967) (same).

the suit against the ICC—in which the railroads themselves intervened as parties—was the statutory means to collect the overcharges. As the Court explained, "[t]his suit therefore is a step in proceedings to settle who is legally entitled to sums of money, the Government or the railroads," and it "present[s] a justiciable controversy." *Id.* at 431. In this case, however, the real party in interest is TVA, which is the only party required to do anything by the EPA order and which is seeking to avoid having to obtain permits for various changes it made to its own generating facilities. Accordingly, the rationale underlying cases such as *United States* v. *ICC*, *supra*, is not present here.

The only remaining authority for the justiciability of a dispute between two Executive Branch agencies is *United States* v. *Nixon*, *supra*, upon which the court of appeals placed its principal reliance. In *Nixon*, however, a regulation conferred substantial protection from removal on the special prosecutor representing the United States, thus making the case to some extent analogous to those in which an agency within the Executive Branch is involved in a controversy with an independent agency whose leaders have protection from removal. 418 U.S. at 695-696. In addition, the Court in *Nixon* emphasized the personal, as well as institutional, interest of the President in the pending criminal proceeding. See *id.* at 687, 697. The "uniqueness of the setting in which the conflict ar[ose]" in *Nixon*, *id.* at 697, makes that case an unlikely source for the court of appeals' broad rule recognizing intra-Executive Branch disputes as presenting "cases or controversies" under Article III.

3. *The court of appeals' resolution of this issue is important.* Further review of the court of appeals' case-or-controversy ruling is warranted. The court of appeals departed from existing precedent by adopting a broad rule of justiciability that potentially renders intra-Branch controversies amenable to judicial resolution in a wide variety of circum-

stances.[10] That rule threatens fundamental separation-of-powers principles embodied in the Constitution. Because the issue goes to the jurisdiction of the courts to resolve this dispute, it will in any event be before the Court if review is granted of the court of appeals' ruling that the Clean Air Act's scheme for penalizing violators of EPA orders is unconstitutional. The Court therefore should grant review of this issue.

C. TVA's Lack Of Independent Litigating Authority

The court of appeals also erred in holding that TVA was authorized to initiate this judicial review proceeding, because TVA lacks authority to litigate disputes over the objection of the Attorney General or his delegate. The Attorney General's authority over the government's litigation, which was first recognized in the act creating the Department of Justice, Act of June 22, 1870, ch. 150, § 1, 16 Stat. 162, is now primarily codified in two provisions of the United States Code. They provide that, "[e]xcept as otherwise authorized by law," "the conduct of litigation in which the United States, an agency, or officer thereof is a party * * * is reserved to officers of the Department of Justice, under the direction of the Attorney General," 28 U.S.C. 516, and the "Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party," 28 U.S.C. 519. Under those provisions, TVA had no

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[10] Four trial-level courts have addressed the justiciability of disputes between TVA and other Executive Branch agencies whose leaders serve at the pleasure of the President, with conflicting results. Compare *United States ex rel. TVA* v. *Easement and Right of Way*, 204 F. Supp. 837 (E.D. Tenn. 1962) (finding no justiciable case or controversy), with *TVA* v. *United States*, 51 Fed. Cl. 284, 287 (2001) (finding justiciable case or controversy present); *TVA* v. *United States*, 13 Cl. Ct. 692, 700-702 (1987) (same); *Dean* v. *Herrington*, 668 F. Supp. 646, 652-653 (E. D. Tenn. 1987) (same).

authority to file a petition for review in this case, and the court of appeals should have dismissed it on that ground.

Courts have recognized the advantages that Congress sought to realize by establishing the statutory presumption of control by the Attorney General, most notably "the centering of responsibility for the conduct of public litigation," including the "initiation" as well as the "subsequent conduct" of litigation. *Sutherland* v. *International Ins. Co.*, 43 F.2d 969, 970, 971 (2d Cir.) (L. Hand, J.), cert. denied, 282 U.S. 890 (1930). Indeed, the rationale for the Attorney General's authority, as this Court has recognized, is that "[t]here must * * * be an officer or officers of the government to determine when the United States shall sue, to decide for what it shall sue, and to be responsible that such suits shall be brought in appropriate cases." *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888); see *United States* v. *Walcott*, 972 F.2d 323, 326 (11th Cir. 1992). Correspondingly, when, as in this case, the Attorney General's delegate has specifically informed a federal agency that it "should not bring this lawsuit" and that the Attorney General has not "tacitly authorized TVA to pursue such litigation," Pet. App. 331a, the agency has no authority to bring the suit, and it should be dismissed.

1. *Absent a clear statement, the conduct of government litigation is entrusted to the Attorney General.* Sections 516 and 519 do provide that where "otherwise authorized by law," a federal entity may initiate litigation outside the control of the Attorney General. In light of the important purposes served by centralizing federal litigation, however, a court would "have to be well satisfied that Congress had intended to make an exception to the policy so indicated" before finding that Congress has authorized federal agency litigation independent of the Attorney General. *Sutherland*,

43 F.2d at 971.[11] For example, in *Federal Election Comm'n* v. *NRA Political Victory Fund*, 513 U.S. 88, 92 (1994), this Court recognized that the Federal Elections Commission had independent litigating authority in the lower federal courts. Citing the FEC's organic statute, which gave the agency the power "to initiate * * *, defend * * * or appeal any civil action * * *, through its general counsel," 2 U.S.C. 437d(a)(6), the Court stated that the FEC's initiation and appeal of an action on its own thus "fall within th[e] 'otherwise authorized by law' exception" to Sections 516 and 519. 513 U.S. at 92 n.1.

2. *No such clear statement is present here.* There is nothing in the statutes governing TVA that similarly constitutes a congressional authorization for independent litigation, especially under the applicable clear statement standard. The court of appeals relied on TVA's practice of representing itself in court to find the necessary congressional authorization of independent litigating authority. Pet. App. 61a. Even if TVA's practice of representing itself in court could establish a form of implicit delegation of authority by the Attorney General, however, it could not establish that TVA may, as here, initiate litigation when expressly instructed not to do so. Cf. *Federal Election Comm'n*, 513 U.S. at 97 (rejecting argument that, because FEC had "represented itself before this Court on several occasions," it had independent litigating authority in this Court when the question of the existence of that authority arose). As this Court explained in *United States* v. *Morton Salt Co.*, 338

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[11] See *ICC* v. *Southern Ry.*, 543 F.2d 534, 536 (5th Cir. 1976) ("The alternative would allow a proliferation of policies among and within the various agencies."); *United States* v. *Alky Enter., Inc.*, 969 F.2d 1309, 1314 (1st Cir.1992); *Marshall* v. *Gibson's Prods., Inc.*, 584 F.2d 668, 676 n.11 (5th Cir. 1978); *FTC* v. *Guignon*, 390 F.2d 323, 324-325 (8th Cir. 1968); see also *The Attorney General's Role as Chief Litigator for the United States*, 6 Op. Off. Legal Counsel 47, 56 (1982).

U.S. 632, 647 (1950), "[t]he fact that powers long have been unexercised well may call for close scrutiny as to whether they exist; but if granted, they are not lost by being allowed to lie dormant, any more than nonexistent powers can be prescripted by an unchallenged exercise."

Nor do the committee reports or the appropriations measure cited by the court of appeals, Pet. App. 62a, 64a, support the court's conclusion. Scattered observations in committee reports examining other issues could not "authorize[] by law" an agency to conduct litigation independent of the Department of Justice. The appropriations measure to which the court of appeals referred prohibited the Attorney General from using appropriated funds "to represent the [TVA] in litigation" unless requested to do so. Pub. L. No. 98-181, § 1300, 97 Stat. 1292. That measure, which as an appropriations rider should not be understood implicitly to have repealed the Attorney General's generally applicable authority under Sections 516 and 519, see *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992); *TVA* v. *Hill*, 437 U.S. 153, 190 (1978), has no bearing on the issue in this case in any event, because the Attorney General has not in this case sought to expend any federal funds "to represent the [TVA] in litigation."

The court of appeals also relied on three cases in which a challenge to TVA's independent litigating authority had been raised and rejected. *Cooper* v. *TVA*, 723 F.2d 1560 (Fed. Cir. 1983); *Dean* v. *Herrington*, 668 F. Supp. 646, 653 (E.D. Tenn. 1987); *Algernon Blair Indus. Contractors, Inc.* v. *TVA*, 540 F. Supp. 551 (M.D. Ala. 1982). In addition to the arguments discussed above, those courts relied variously on language in the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 169, 96 Stat. 51, and the Customs Courts Act of 1980, Pub. L. No. 96-417, § 705, 94 Stat. 1748, each of which involved the renaming of certain specialized federal courts and provided that "[n]othing in this Act

affects" TVA's authority to "represent itself by attorneys of its choosing." Although those provisions leave undisturbed any independent litigating authority TVA may have had, they do not grant TVA any *new* authority, and they certainly do not address the specific question whether TVA's authority may continue unhindered over the objection of the Attorney General. Those courts also relied on several provisions in TVA's organic statute, including one authorizing TVA to "sue and be sued." 16 U.S.C. 831c(b). That common provision, however, merely designates TVA as a distinct jural entity and waives its immunity to suit. See, *e.g.*, *FDIC* v. *Meyer*, 510 U.S. 471, 480-483 (1994); *United States* v. *Smith*, 499 U.S. 160, 168-169 (1991). It does not change the application of Sections 516 and 519 or give TVA independent litigating authority.[12]

D. Standing Of The Non-TVA Parties

The court of appeals also resolved another issue of potential importance, when it held that the non-TVA petitioners had standing to file their petitions for review of the EPA's order, even though that order was not directed to them and imposed no obligation on them. See Pet. App. 89a-98a. The government disagrees with the court of appeals' resolution of that issue, which is inconsistent with the decisions of other

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[12] TVA's Board has authority to "appoint such managers, assistant managers, officers, employees, *attorneys*, and agents as are necessary for the transaction of its business, fix their compensation, define their duties, and provide a system of organization to fix responsibility and promote efficiency." 16 U.S.C. 831b (emphasis added). That provision grants the Board the authority to appoint attorneys, but such attorneys may serve in a number of capacities—rendering advice, negotiating with other entities, appearing in court when the Attorney General authorizes such appearance—that do not involve representing TVA in litigation over the objection of the Attorney General. The provision accordingly does not embody a congressional intent—much less a clear statement—that TVA has independent litigating authority.

courts. Compare *Sierra Club* v. *EPA*, 292 F.3d 895, 899-900 (D.C. Cir. 2002) (holding that in petition for review in court of appeals, petitioner's burden is "the same as that of a plaintiff moving for summary judgment in the district court" and requires petitioner to "show a 'substantial probability' that it has been injured, that the defendant caused its injury, and that the court could redress that injury"), with Pet. App. 93a (requiring only that non-TVA petitioners have "adequately alleged injury"). The standing issue as framed below presents factual and legal complexities, however, and could prove difficult of resolution in this case.

Moreover, resolution of that issue is unlikely to affect the disposition of this case. If the Court determines that, as argued above, the dispute between TVA and EPA presents no Article III case or controversy, then this entire case should be dismissed, because EPA would have no ability to obtain judicial enforcement of its order directed to TVA. Without the possibility of judicial enforcement (or judicial imposition of sanctions for noncompliance), EPA's order to TVA would not constitute the government's "ultimate statement," nor would it be an action "by which rights or obligations have been determined" or from which "legal consequences will flow" under *Bennett* v. *Spear*, 520 U.S. 154, 178 (1997) (quotation marks omitted).[13] The EPA order would therefore not be a final order subject to judicial review at the behest of the other, non-TVA parties to this case, and dismissal of the petitions for review would be required (together with vacatur

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[13] See Exec. Order No. 12,146, *Management of Federal Legal Resources*, 44 Fed. Reg. 42,657, 42,658 (1979) (directing submission of interagency legal disputes to the Attorney General); Exec. Order No. 12,088, *Federal Compliance with Pollution Control Standards*, 43 Fed. Reg. 47,707 (1978) (requiring disputes concerning pollution control at federal facilities to be reviewed by EPA Administrator and then, if necessary, referred to the Director of the Office of Management and Budget).

of the court of appeals' unwarranted constitutional rulings). On the other hand, if the Court determines that TVA's petition is justiciable and that TVA had the authority to file its petition for review, then the Court could proceed to review the court of appeals' constitutional ruling that resulted in its order dismissing TVA's petition. In either event, the standing of the non-TVA petitioners would not affect the disposition of the case.[14] Accordingly, the government has not petitioned for review of the court of appeals' decision that the non-TVA petitioners have standing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[14] The standing of the non-TVA parties would be relevant to the resolution of this case only if the Court were to determine that this case presents a case or controversy under Article III but that TVA has no independent litigating authority. In that event, a remand to the court of appeals to determine whether the non-TVA parties have standing *even in the absence of TVA* might be appropriate.